"No sentence of caning shall be executed by instalments and none of the following persons shall be punishable with caning:—

(a) females;

(b) males sentenced to death;

(c) males whom the court considers to be more than fifty years of age."

There appears therefore to be an apparent conflict between the provisions of section 3 of the Punishment for Vandalism Act 1966 and the provisions of section 55(3) of the Children and Young Persons Ordinance on the power of a court other than the High Court to impose a sentence of caning on a person under the age of sixteen but the answer in my opinion can be found by a consideration of section 274 of the Criminal Procedure Code (Cap. 132) which is a clear enactment that none of the three categories of persons specified therein shall be punishable with caning and is in my opinion a clear enactment of general application so that in respect of these three categories of persons no court whatsoever can sentence any of them to caning. Section 55(3) of the Children and Young Persons Ordinance is however not of the same general application in that persons under the age of sixteen can be sentenced to corporal punishment by the High Court.

Having regard to section 55(3) of the Children and Young Persons Ordinance (Cap. 128) and section 274 of the Criminal Procedure Code what then is the true construction of section 3 of the Punishment for Vandalism Act 1966? In approaching this problem I would adopt as correct the passage in *Craies* on Statute Law 6th edition at page 531 where it is stated: —

"The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. 'All modern Acts are framed with regard to equitable as well as legal principles.' 'A hundred years ago,' said the court in *Lyons'* case, 'statutes were required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.' Therefore, 'although the common distinction,' as Pollock C.B. said in *Nicholson* v. *Fields*, 'taken between penal Acts and remedial Acts, that the former are to be construed strictly and the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a judge,' yet the distinction now means little more than 'that penal provisions, like all others, are to be fairly construed according to legislative intent as expressed in the enactment, the courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope'."

The legislative intent is clear from the preamble which states that it is "An Act to provide for exemplary punishment for acts of vandalism". It is also, in my opinion, clear that the legislature by its express reference to section 274 of the Criminal Procedure Code intended to embrace all persons, except the three categories specified therein, within the latter part of section 3 i.e. the punishment of caning.

I am accordingly of the view that the sentence of caning imposed by the magistrate on the appellant was a valid sentence and the appeal is therefore dismissed and the sentence affirmed.

Appeal dismissed.

LIEW SHIN LAI v. MINISTER OF HOME AFFAIRS

[Misc. Cr. App. (Ong Hock Sim J.) March 26, 1969]

[Penang — Miscellaneous Criminal Application No. 3 of 1969]

Banishment — Citizen by operation of law — Deprivation of citizenship — Banishment order — Whether court can review — Whether Banishment Ordinance, 1959, s. 5 available to non-citizen.

Constitutional Law — Citizenship — Deprivation of — Citizen to be given every opportunity to be heard before deprivation order made — Malaysia Constitution, arts. 14 & 27.

The applicant sought to set aside the banishment order made against him on February 15, 1969, on the ground that under section 5(1) of the Banishment Ordinance, 1959, a banishment order could only be made in respect of any person not being a citizen of the Federation. The applicant was a citizen by operation of law. By reason of the order of deprivation made on June 3, 1968 and gazetted on June 20, 1968, the applicant ceased to be a citizen.

Held: the applicant could not avail himself of section 5 of the Banishment Ordinance.

MISCELLANEOUS CRIMINAL APPLICATION.

Albert Lee Him for the applicant.

Abdul Razak bin Dato Abu Samah (State Legal Adviser) for the respondent.

Ong Hock Sim J. (delivering oral judgment): This is an application by the applicant to set aside the order of banishment made against him on the 15th February, 1969 on the ground that he is a citizen by operation of law by reason of his birth in Penang on the 7th day of December, 1937. The application is made under section 10 of the Banishment Ordinance No. 11 of 1959.

There is no dispute his birth did, pursuant to article 14 of the Constitution, confer on him citizenship by operation of law. In reply, the Assistant Minister of Home Affairs filed an affidavit setting out that notice of intention to deprive the applicant of the citizenship was served on the applicant on 16th April, 1965 at his then last known place of residence namely, 128-L Sungei Buloh New Village, Selangor, and in that notice the applicant was required to give information in writing if he claimed to have the matter referred to a committee of inquiry appointed under article 27 of the Constitution. There is no evidence that any such notice in writing was given by the applicant but the applicant claims that he was summoned to court and he did attend on some four occasions. Clause (2) of article 27 provides that even though the applicant has not claimed to have his case referred to a committee of inquiry, the Federal Government may itself refer the case to the committee. Rule 38 of the Citizenship Rules 1964, seems to support the allegation made by the applicant that he was called to attend court on some four occasions, presumably to appear before the committee of inquiry and to be heard before it makes its report to the Government pursuant to such reference

with regard to the deprivation of citizenship of the applicant. I think clause (3) of article 27 which says "... and the Federal Government shall have regard to the report in determining whether to make the order" is inserted in recognition that citizenship is a valuable right and asset and before a citizen is deprived of that, he should be given every opportunity to make his representation or to be heard before making an order of deprivation.

This, however, is an application to set aside the banishment order on the ground that under section 5(1) a banishment order can only be made in respect of any person not being a citizen of the Federation. I am satisfied from *Gazette* Notification No. 2728 dated 20th June, 1968 that the applicant has ceased to be a citizen by reason of the order of deprivation made on 3rd June, 1968 and accordingly he cannot avail himself of section 5. Whatever complaints he may wish to present with regard either to the manner or the circumstances under which the order of deprivation was made against him or as to its propriety, cannot be entertained by me in this application. Even if he wishes to make an attempt to challenge the order of deprivation, he would find himself barred from so doing by section 2 of Part III of the Second Schedule of the Constitution headed "Supplementary Provisions relating to Citizenship" which says, "A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court." I accordingly dismiss the application. There will be no order as to costs.

Application dismissed.

Solicitors: *Goh Eng Kee & Co.*

NAGAPUSHANI v. NESARATNAM & ANOR.

[O.C.J. (Raja Azlan Shah J.) April 26, 1969]

[Kuala Lumpur — Civil Suit No. 250 of 1964]

Family Law — Husband and Wife — Title to property — Presumption of advancement — Gift of sums deposited into wife's savings account — Part of purchase price of property paid by wife — Amount unascertained — Property shared equally by both spouses.

Hindu Law — Marriage by Hindu rites — Evidence — Cohabitation and reputation of husband and wife — Presumption.

Equity — Dispute between husband and wife — Equity leans towards equality — "Palm tree" justice.

The first defendant was the registered owner of a piece of land and house (hereinafter called "the property"). In 1959, he executed an assignment of his rights in respect of the property in favour of the plaintiff. The property was reassigned by the plaintiff to him in 1961. Finally in 1962, the first defendant assigned it in favour of his mother, the second defendant.

The plaintiff claimed that the aforesaid assignments executed in 1961 and 1962 were void on the grounds of coercion and fraud. Evidence was tendered on her behalf to prove that she was the wife of the first defendant. Of the purchase price of $17,500 for the said property, $5,600 had been paid by monies drawn from the plaintiff's Post Office Savings Account. The savings account had been opened by the first defendant in the name of the plaintiff with an initial deposit of $250. Thereafter the first defendant deposited various sums from time to time. The plaintiff also deposited the savings from the household allowances given to her by the first defendant into the account.

The plaintiff brought an action against the defendants for a declaration that she was the beneficial owner of the said property and for the payment to her of the rents collected from the tenants of the house, less the amount expended for payment of quit rent and assessment rates.

Held: (1) the plaintiff had sufficiently proved that she was the wife of the first defendant. There was no evidence to support the allegations of coercion and fraud and the assignments were therefore valid;

(2) where a husband transfers property to the name of his wife there is a presumption of an intention to effect a gift to her. In this case, the presumption of gift was rebutted by the plaintiff's re-assignment of the property to the first defendant in 1961;

(3) there was a presumption of a gift to the plaintiff of the monies deposited by the first defendant into the plaintiff's savings account. The savings from household allowances however, belonged to the first defendant. As it was not possible to ascertain the exact portion contributed by each spouse, the rule that equity leaned towards equality applied and both spouses have equal shares in the property;

(4) the absence of an intention between the parties to create legal relations did not affect the plaintiff's claim as it did not depend upon the existence of a legally enforceable contract between her and the first defendant but was founded upon the rights and privileges which flowed from the special relationship between husband and wife;

(5) the effect of the plaintiff's assignment of her rights in the property in favour of the first defendant was that the latter was deemed to hold her interest on trust for her. The first defendant was therefore liable to account to the plaintiff for one half of the rents collected by him less the payment for quit rent and assessment rates.

Cases referred to:-

(1) *Spivack* v. *Spivack* (1930) 142 L.T. 492.
(2) *Paramesuari* v. *Ayadurai* [1959] M.L.J. 195.
(3) *Silver* v. *Silver* [1958] 1 All E.R. 523.
(4) *Mews* v. *Mews* (1852) 15 Beav. 529.
(5) *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579.
(6) *Re Rogers' Question* [1948] 1 All E.R. 328.
(7) *Rimmer* v. *Rimmer* [1952] 2 All E.R. 863.
(8) *Cobb* v. *Cobb* [1955] 2 All E.R. 696.
(9) *Mercier* v. *Mercier* [1903] 2 Ch. 98.
(10) *Spellman* v. *Spellman* [1961] 1 W.L.R. 921.
(11) *Balfour* v. *Balfour* [1919] 2 K.B. 571.

CIVIL SUIT.

A. Mahendra for the plaintiff.

R. R. Chelliah for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This action is brought by Nagapushani d/o Chelliah against Nesaratnam s/o Rasiah (first defendant) and Thangammah d/o Velupillai (second defendant). The plaintiff claimed to be the wife of the first defendant and the daughter-in-law of the second defendant who was the mother of the first defendant. She claimed that on 30th April 1942 at Sungei Buloh, she went through a ceremony of marriage with the first defendant according to Hindu rites. The defendants denied this. In June or July 1957 the first defendant negotiated with one Ng Choo Kiat Company, Petaling Jaya for the purchase of two pieces of land on which houses were to be built. The pieces of